

STATE OF VERMONT

HUMAN SERVICES BOARD

In re ) Fair Hearing No. T-04/09-209  
 )  
Appeal of )

INTRODUCTION

The petitioner appeals a decision by the Department of Disabilities, Aging and Independent Living (DAIL) finding him clinically ineligible for the Medicaid Choices for Care (CFC) program. The issue is whether the petitioner's medical condition requires ongoing nursing home level care. The following findings are based on testimony and documents submitted at a hearing in this matter held on January 19, 2010.

FINDINGS OF FACT

1. The petitioner is a seventy-nine-year-old man with a history of schizophrenia and chronic kidney disease. Until December 2008 he had resided at the "domiciliary unit" of Vermont Veterans Home since 1996.

2. In December 2008, the petitioner was hospitalized for three weeks with acute urinary blockage and kidney failure caused, in part, by his inability to be aware of and communicate his physical condition (i.e., inability to urinate). Upon his discharge he was admitted to the Veterans

Home's skilled nursing unit for rehabilitative care. When his approved period of rehabilitation ended, he applied for CFC. Following an assessment, on February 4, 2009 DAIL denied his application for CFC for skilled nursing home care.

3. The petitioner filed his appeal in this matter on April 9, 2009, and several telephone status conferences have been held with the parties' attorneys. Following the petitioner's appeal DAIL agreed to review its assessment of the petitioner's medical condition. Following that review, the matter was continued to allow the petitioner to depose witnesses and obtain all of DAIL's records in the matter. Following the hearing on January 19, 2010 the record was held open until March 5, 2010 for the submission of written legal arguments. Further delay was due to a backlog in this hearing officer's workload. The petitioner has continued to reside in the skilled nursing facility at the Veterans Home since his discharge from the hospital in December 2008. The petitioner's eligibility for Medicaid to cover his current nursing home costs has been continued pending resolution of this Fair Hearing.

4. The petitioner's primary physical problems are his ongoing needs for urinary catheterization and monitoring for his continuing high risk of renal infection. Although there

is disagreement as to the level of vigilance required to meet his physical needs, the evidence regarding the petitioner's ongoing medical condition and level of functioning is not really in dispute.

5. He can wash himself, but needs daily reminding, "cueing", and monitoring to ensure proper hygiene. He needs further cueing and supervision at least three times a week with other toileting needs, although not actual physical assistance. He needs daily physical assistance in switching his catheter bag to his other leg, and regular monitoring of his urine flow.

6. A urologist performs periodic catheter inserts for the petitioner every four-to-six weeks. The petitioner needs a nurse to administer inter-muscular injection medications every three months. He receives closely monitored doses of psychotropic medication on a monthly basis.

7. The petitioner's mental illness makes him incapable of monitoring and reporting his physical condition, and makes him dismorphic and resistant to people touching him. He has behavioral issues that include sitting on the floor, removing table cloths, and inappropriate sexual advance toward staff. All of these problems, when they occur, are handled by the staff verbally "redirecting" him. There is no allegation or

evidence that his behavior is physically violent or threatening to others.

8. There is no dispute that the petitioner requires a "structural setting" in which to live. There is also no dispute that he is functioning well in his current residence in the skilled nursing facility of the Veterans Home.

9. It cannot be found, however, that the petitioner actually requires skilled nursing care on a daily basis. Almost all his daily needs require only, albeit vigilant, verbal assistance or cueing, which could be performed by a trained caregiver outside of a skilled nursing facility, with medical overview.

10. There is no credible evidence that the petitioner's physical or mental health would be threatened by moving to a less structured facility, provided that appropriate supervision, monitoring, and cueing could be provided.

11. While it is clear (and undisputed by DAIL) that careful discharge planning would be necessary, there is also no evidence at this time that suitable alternative placements for the petitioner do not exist. DAIL concedes that the petitioner would probably qualify for Medicaid benefits to enable him to live in a community residential care home.

ORDER

Dail's decision is affirmed.

REASONS

Types of residential care facilities and institutions are defined and regulated by state law. See 33 V.S.A. § 7102. "Nursing homes", like the one in which the petitioner currently resides, are considered "skilled nursing facilities", which provide the highest, and most restrictive, level of individual care, services and supervision.

DAIL operates the Choices for Care (CFC) program through a waiver from the Centers for Medicare and Medicaid Services. The primary goal of the CFC program is to provide individuals who need *nursing home level* care with a *choice* of either nursing home care or remaining in the community by providing home health care for Activities of Daily Living (ADLs) and Instrumental Activities of Daily Living (IADLs). There is no basis to conclude that the CFC program was intended to revise or *lower* the medical criteria in order to, in effect, make it easier for individuals like the petitioner to enter or remain in nursing homes. Clearly, DAIL has reasonably and lawfully determined, as a matter of practice and policy, that only those with medical conditions *necessitating* skilled nursing home care should be placed in such facilities.

The eligibility criteria for CFC are set out in CFC Regulations Section IV. Section IV.A.2 states that to be eligible:

...an individual must have a functional physical limitation resulting from a physical condition (including stroke, dementia, traumatic brain injury, and similar conditions) or associated with aging.

DAIL has created categories of need including "highest needs" and "high needs". Currently, due to funding constraints, DAIL provides CFC coverage only for those individuals in the "highest needs" group. Persons who are determined to be in the "high needs" group are now placed on a "waiting list" for CFC eligibility. The issue in this case is whether DAIL is correct under the regulations that petitioner does not meet the eligibility criteria for the "highest" or "high" needs groups.

In terms of the "highest needs" group, CFC Regulation Section IV.B.1.b states, in pertinent part:

Individuals who apply and meet any of the following eligibility criteria shall be eligible...

- i. Individuals who require **extensive or total assistance** with at least one of the following Activities of Daily Living (ADLs): toilet use, eating, bed mobility; or transfer, and require at least limited assistance with any other ADL. (emphasis added.)

In terms of the "high needs" group, CFC Regulation  
Section IV.B.2.b states:

Individuals who meet any of the following eligibility  
criteria shall be eligible for the High Needs group and  
may be enrolled in the High Needs group:

i. Individuals who require **extensive to total  
assistance on a daily basis** with at least one of  
the following ADLs:

Bathing	Dressing
Eating	Toilet Use
Physical Assistance to Walk	
(emphasis added.)	

The Board has held that an individual requiring only  
partial or limited assistance with the above ADLs does not  
meet the criteria in the above regulations. See e.g. Fair  
Hearing Nos. A-11/08-522 and S-02/09-99.<sup>1</sup> It cannot be  
concluded that the need for cueing, verbal assistance, and  
verbal behavioral redirection, even if required on a daily  
basis, meets the above definitions of "extensive to total  
assistance".

The above notwithstanding, no one is suggesting that the  
petitioner in this case be immediately discharged from the  
nursing home into an unsupervised setting, only that the  
evidence supports DAIL's decision that the petitioner's

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<sup>1</sup> The Board has also held that the need for cueing and verbal assistance  
alone does not meet the definition of "assistance with personal care"

medical and functional needs can be met, at least hypothetically, in a setting other than a nursing home.

Inasmuch as DAIL's decision in this matter that the petitioner is not eligible for Choices for Care is in accord with the above provisions, it must be affirmed. 3 V.S.A. § 3091(d), Fair Hearing No. 1000.4(D).

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under the Attendant Care Services Program. Fair Hearing Nos. 20,895 and 16,168.